Supreme Court, U.S.
FILED
AUG 28 2002
CLERK

No. 02-137

IN THE

SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, WARDEN, PETITIONER

vs.

JOHN LOUIS VISCIOTTI, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a finding by the circuit court upholding the district court's finding that John Visciotti was denied the effective assistance of counsel at the penalty phase of his capital trial and was prejudiced by this denial. The State does not defend the performance of trial counsel; nor does the state challenge the wealth of mitigating evidence that could have been presented but for trial counsel's failings. Rather, the state challenges only the circuit court's reading of the state court decision.

The State contends that the circuit court erred in granting relief because the state court decision was not "contrary to" governing Supreme Court precedent, namely, Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, prejudice is shown if there is a "reasonable probability" that, but for counsel's failings, the outcome of the trial would have been different. 466 U.S. at 694. The circuit found that state court here erroneously applied a standard more stringent than Strickland's "reasonable probability" standard, and therefore the decision was contrary to law. Williams v. Taylor, 529 U.S. 362, 405-406 (2000). The State further contends that the state court decision was not an "unreasonable application" of Strickland. The Circuit found that, even assuming the use of the correct standard under Strickland, the state court misapplied Strickland both by failing to consider the totality of trial counsel's malfeasance and by failing to find prejudice under the specific facts of this case.

The State's petition presents the following questions:

1. Whether, under AEDPA, a state court decision is "contrary to" United States Supreme Court pecedent (28 U.S.C. § 2254(d)(1)) when it quotes and cites the proper standard to be applied from the controlling Supreme Court authority, but in discussing the issue also uses a single word as a shorthand term for that standard, which, when considered in isolation, can be interpreted as stating an incorrect standard?

2. In determining under AEDPA, whether a state court decision is an unreasonable application of United States Supreme Court precedent (28 U.S.C. § 2254 (d)(1)), may a federal court assume a state court did not consider relevant matters because the state court did not expressly state it considered the matters, even if the state court discusses the matters in another part of its written decision, such as in a review of the evidence from lower court proceedings or a review of the petitioner's allegations?

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OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent John Louis Visciotti hereby opposes petitioner's petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit vacating the sentence of death.

I.

OPINIONS BELOW

The opinions from below have been included in the State's Appendix A through E.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 2002. The jurisdiction of this Court is pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense.

Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, 28 U.S.C. section 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

IV.

STATEMENT OF THE CASE

A. Jurisdiction in the District Court.

The district court had jurisdiction pursuant to 28 U.S.C. § 2254 as Visciotti "in custody pursuant to the judgment of a State court," and he is in custody "in violation of the Constitution or laws or treaties of the United States."

B. Facts Material to the Consideration of the Questions Presented.

1. Trial Counsel's Failings.

The shooting that led to the trial, conviction, and sentence of death occurred on the evening of November 8, 1982. Visciotti and Brian Hefner were arrested the next morning, and both admitted their involvement in videotaped statements to deputy sheriffs at the sheriff's station. State's Appendix ("App.") 14a. Shortly thereafter, Visciotti participated in a videotaped interrogation at the scene of the crimes, referred to as a "reenactment." Visciotti and Hefner concurred at the reenactment that while Visciotti had been the one to actually pull the trigger, Hefner had supplied the weapon and ordered Visciotti to shoot. Visciotti said that he had been intoxicated at the time of the crimes and panicked when Hefner ordered him to shoot. The police tested Viscotti's blood the day after the crimes and found cocaine and benzoylecgonine, a metabolite of cocaine, in his system. App. 14a.

Viscotti's family retained Roger Agajanian to represent him. The undisputed record of Agajanian's failings shows that Agajanian did not interview either the surviving victim (Wolbert) or the co-perpetrator (Hefner). App. 57a.

He did not investigate the noticed aggravators. App. 55a-56a. He did not procure or review any records having to do with Viscoitti's background, medical history, school history, history of drug use, juvenile probation, prior convictions, prior incarcerations, or any other material relevant to his history. App. 40a. He did not interview any of Visciotti's family members about his childhood or the family background. App. 40a. He provided no information to doctors whom the court had appointed to evaluate Visciotti's competency, and disregarded the doctors' requests for such information. App. 41a. He ignored suggestions from an appointed doctor that Visciotti had a history of mental illness and seizure disorder. App. 43a-44a. He retained no experts for the penalty phase. In Agajanian's own estimation, he spent between thirty and forty hours "at the outside" in investigating the guilt and penalty phases of Visciotti's trial.

Agajanian's penalty phase presentation consisted of testimony from Viscotti's family members about his good character.

At closing arguments, Agajanian "delivered an unfocussed closing argument, during which he undercut his client's case by telling the jury that the evidence of [Visciotti's] mental and emotional problems was not mitigating." In re Visciotti, 14 Cal. 4th 325, 353 (1996) (App. 142d-143d). The argument was "a rambling discourse, not tied to particular evidence.'" 14 Cal. 4th at 331 (App. 86d). Agajanian conceded that nine of the eleven statutory sentencing factors in California Penal Code section 190.3 favored the prosecution without even mentioning the evidence that would support a mitigating interpretation of several of those factors. App. 58a.

2. The State Court Opinion

After a hearing in state court on the ineffective assistance of counsel claim, the California Supreme Court determined that the "evidence offered at the state evidentiary hearing regarding trial counsel's lack of preparation and investigation was uncontradicted." 14 Cal. 4th 325 at 336 (App. 98d-99d). The California Supreme Court also found that expert testimony describing "overwhelming mitigating circumstances" in "an absolutely horrendous family history" of abuse was consistent with the testimony of Visciotti's siblings regarding his abusive upbringing. 14 Cal. 4th at 341 (App. 111d, 120d). Nonetheless, the court denied the petition because it did not agree that a different penalty verdict "would have been reached" had a jury heard mitigating evidence of Viscotti's background. 14 Cal. 4th at 351 (App. 137d).

3. Federal Appellate Opinion.

After being denied relief by the California Supreme Court, Viscotti filed a petition for writ of habeas corpus with the district court. Visciotti alleged, among other claims, that his sentence should be vacated because he received ineffective assistance of counsel at the penalty phase of his trial. The district court granted the petition as to the death penalty, finding that here was a "reasonable probability" of a more favorable penalty phase verdict but for counsel's failings.

The circuit court found that the state court's decision was deficient for three independent reasons. First, it held that the decision of the California Supreme Court denying Viscotti's claim of ineffective assistance of counsel at the penalty phase was "contrary to" Strickland v. Washington, 466 U.S. 668 (1984). Strickland holds that prejudice has been established where there is a "reasonable probability" that, but for counsel's ineffectiveness, a more favorable result to the defendant would have occurred. Strickland, 466 U.S. at 694. A "reasonable

controlling federal law as established by the United States Supreme Court and therefore is entitled to no deference under 28 U.S.C. section 2254(d)(1).

In Williams, this Court held that the 2254(d)(1) "contrary to" language should be interpreted as it is "commonly understood," explaining, that a "state court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." Williams, 529 U.S. at 405. The Williams Court then offered a concrete illustration of a state court decision that would be contrary to established law:

> Take, for example, our decision in Strickland v. Washington [citation omitted]. If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a 'reasonable probability that . . . the result of the proceeding would have been different.' [citation omitted]

Williams, 529 U.S. at 405-406.

This is precisely the error that the state court committed in this case. Throughout the opinion, the state court repeatedly cited to a preponderance of the evidence standard. Rather than looking at the reasonable probabilities of a different outcome, the court focused only on whether a more favorable result was "probable" but for counsel's performance -- a higher standard than Strickland requires:

> Because [Visciotti] has not established that absent those failings it is probable that a more favorable result would have been reached by the penalty jury, he is not entitle to relief.
>
> [Viscotti's] effort to show that if the jury had been made aware that his family background led to his substance abuse and assaultive conduct while under influence of drugs a different penalty verdict would have been reached is unpersuasive. . . .
>
> It is not probable that had this evidence [of drug addiction] been presented a more favorable result would have resulted at the penalty phase . . . .
>
> We cannot conclude that it is probable that the jury would have found that the evidence of petitioner's troubled family background itself would have outweighed that aggravating evidence . . . .
>
> Under the circumstances it is not probable that the jury would have found evidence that petitioner's childhood was troubled or that he turned to drugs as a means of escape from an unbearable family situation mitigating sufficiently so that the evidence would have affected the jury determination . . . .

In re Visciotti, 14 Cal. 4th at 330, 351, 355-356 (App. 82d, 137d, 146d-147d, 150d) (emphases added). Thus five times the state court used a more-likely-than-not standard, by reference to either the word "probable" or the words "would have."

The definition of what is "probable," both in jurisprudence and common usage, differs materially from that of a "reasonable probability." As Williams made clear, a "reasonable probability" is something less than a preponderance of the evidence. Williams, 529 at 405-406. See also Strickler v. Green, 527 U.S. 263, 289 (1999) (a "reasonable probability" is a lower standard than "more likely than not"); Nix v. Whiteside, 475 U.S. 157, 175 (1986) ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in the case.").

"Probable" or "probably" means "more likely than not," or a preponderance of the evidence. "[P]robable' or 'likely' implies more than a 50 percent chance of an event happening . . . ." United States v. Main, 113 F.3d 1046, 1049 (9th Cir.,

1997). Where an event is not probable there nonetheless could be a "reasonable probability" of the event occurring. Id. See also United States v. Bagley, 473 U.S. 667, 680 (1985) (Blackman, J., concurring) (by adopting a "reasonable probability" standard for Bagley violations, the Court "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal") (emphasis added); Strickler v. Green, 527 U.S. 263, 297-300 (Souter, J., concurring and dissenting) (cautioning against interpreting "reasonable probability" as a cognate of "probably" and thus confusing it with the higher "more likely than not" standard.).

In looking to whether it was "probable" that a more favorable result would have occurred but for counsel's ineffectiveness, the state court thus imposed a "more likely than not" standard. The court's application of that standard, as Williams makes pellucid, is 'contrary to' established law. Williams, 529 at 405-406.

The State attempts to rectify the state court's error by claiming that the court, once at least, quoted the correct "reasonable probability" standard from Strickland. Williams v. Taylor refutes this argument. In Williams, the Court confronted a decision in which the state court correctly cited the "reasonable probability" standard from Strickland when it analyzed an ineffective assistance of counsel claim. At the same time, the state court misunderstood Lockhart v. Fretwell, 506 U.S. 364 (1993) to limit the Strickland test. The Williams Court found that the state decision was nonetheless contrary to law, that is, a state court's reference to the correct standard does not cure a decision that depends as well on an incorrect standard. Williams, 529 S. Ct. at 397 (majority op.); id., at 414 (O'Connor, J., concurring).

This case presents a more egregious misapplication of Strickland than that which the Court struck down in Williams. As the dissent in Williams notes, the state court in fact did weigh the potential evidence and determine that there was not a reasonable probability -- or any probability -- that but for counsel's performance the result would have been different. Williams, 529 U.S. at 417-418 (Rehnquist, C.J., dissenting). The problem, as the Williams majority decided, was that the state court decision rested also on a perceived limitation of Strickland announced by Lockhart v. Fretwell. Here, the California Supreme Court never held that the possible mitigating evidence failed to establish a reasonable probability of a different result. Instead, after an introductory quote of the correct "reasonable probability" standard from Strickland, the court's analysis and weighing of the evidence looked only to whether the evidence proved a more favorable result was probable. In re Visciotti, 14 Cal. 4th at 355-356 (App. 146d-150d). Every single time the state court turned to apply the law to the facts, it misstated the standard. 14 Cal. 4th at 351, 355-356 (App. 146d-150d).

The State also attempts to rectify the state court's misstatement of the standard by characterizing it as "short-hand" for the "reasonable probability" standard of Strickland. There is no basis for this re-writing of the state court opinion. A reading of the opinion demonstrates that the state court itself understood "probable" to mean more likely than not. When not using the word "probable" to describe the standard, the state court asked if the outcome "would have" been different but for trial counsel's failings. 14 Cal. 4th at 351 (App. 137d). Use of the construction "would have" betrays the state court's misapprehension that a "more-likely-than-not" standard applied.

The State also claims that a similar "shorthand" for the Strickland standard was used in Williams v. Taylor and Mickens v. Taylor, 122 S. Ct. 1237 (2002), but

the state is mistaken. Petition for Certiorari, at 11. The cited shorthand usage of "probably" in Williams (529 U.S. at 393) occurred in a summary of the analysis of the Virginia Supreme Court. The Court did not use this incorrect standard when conducting its own prejudice analysis. And in Mickens, there was no prejudice analysis at all: the petitioner was arguing that prejudice need not be shown given his attorney's conflict of interest. The Court rejected this claim, and then determined that in any event prejudice could not be shown, as the court of appeals had found that the conflict had "no .. effect" on the outcome of the trial. 122 S. Ct. 1245. As in Williams, the Court never used the "probably" standard in assessing prejudice.

This is not a case of the state court once or twice paraphrasing the Strickland standard in an opinion which otherwise shows that the correct standard is understood. After initially quoting the standard from Strickland, the state court misstated the standard five times over. Every time it summarized in its own words what the standard meant, the state court erroneously constructed a "more-likely-than-not" standard of prejudice. The court of appeals thus correctly decided that the state court decision was contrary to law and was therefore no bar to relief under 28 U.S.C. section 2254(d)(1).

B. The State-Court Decision Was An Unreasonable Application of Strickland Because the State Court Did Not Consider the Prejudicial Effect of All of Counsel's Failings.

The circuit court further determined that, even if the state court applied the correct standard under Strickland, the state-court decision was an "unreasonable application" of Strickland because the state court did not consider the "totality" of counsel's failings in assessing prejudice. 288 F.3d at 1118 (App. 65a). The

circuit court's analysis was informed by Williams v. Taylor, where the Court found the state court decision an "unreasonable application" of Strickland because it "failed to evaluate the totality of the available mitigation evidence . . .in reweighing it against the evidence in aggravation." Williams, 529 U.S. at 397-398.

The California Supreme Court, like the state court in Williams, failed to consider significant mitigating evidence and the full prejudicial effect of trial counsel's failures. Instead, as the state court began to parse the mitigating evidence available to Viscoitti, it considered each piece of evidence standing alone, and not as a part of the totality of evidence to be weighed against the case in aggravation. With regard to evidence of Visciotti's abusive upbringing, the state court opined, "We cannot conclude that it is probable that the jury would have found that the evidence of petitioner's troubled family background itself would have outweighed that aggravating evidence." In re Visciotti, 14 Cal. 4th at 355 (App. 147d) (emphasis added). With respect to the evidence that Visciotti was intoxicated before and during the capital crime, the state court discounted this specific piece of evidence because it was minimal "in comparison with the aggravating evidence." .14 Cal. 4th at 356 (App. 150d). As the circuit court found, there is no indication that the state court ever considered the totality of the available mitigating evidence against the aggravating evidence. Visciotti, 288 F.3d at 1118 (App. 66a).

The circuit further found that the state court never considered in any respect the mitigating effect of Visciotti's brain damage or adjustment to incarceration. 288 F.3d at 1118 (App. 66a). Finally, the circuit noted that the state court had not weighed the prejudicial effect of trial counsel's inaccurate portrayal of Visciotti as the one "bad seed" of his family, or of trial counsel's numerous concessions

during closing argument (such as trial counsel's argument that any evidence of mental impairment was not mitigating.) 288 F.3d at 1118 (App. 66a).

The State argues that a reading of the state court opinion does not support the circuit court's analysis of it. The plain language of the state court decision contradicts that argument. As the decision makes clear, the state court found no prejudice because the evidence of Visciotti's troubled family background "itself" did not outweigh the aggravating evidence. There is no analysis of whether such evidence, in combination with all available mitigating evidence, outweighed the aggravators. In the portion of the state court opinion devoted to the prejudice analysis (beginning at 14 Cal. 4th at 354 (App. 143d)), there is no consideration of the weight of the evidence of brain damage or adjustment to incarceration. Finally, there is no discussion at all in the prejudice section of the decision of the possible prejudicial effect of trial counsel's affirmative misdeeds, such as inaccurately labeling Visciotti a "bad seed" and instructing the jury not to consider possibly mitigating evidence. Visciotti, 288 F.3d at 1118 (App. 66a); In re Visciotti, 14 Cal. 4th at 354-357 (App. 143d-151d).

The State argues that the California Suprme Court considered mitigation evidence because it summarized some of the evidence presented at the state evidentiary hearing. The State's argument fails also because there is no functional distinction between the state court opinion here and the Virginia Supreme Court's opinion in Williams. In Williams, the state court noted the mitigating evidence that had been presented at trial, and made mention as well as the additional items of mitigating evidence presented in the state habeas evidentiary hearing. Williams v. Warden, 254 Va. 16, 20-21 (1997). Nevertheless, because the Virginia Supreme Court did not then consider the "totality" of such evidence, its decision was an unreasonable application of Strickland. Williams v. Taylor, 529 U.S. at

397-398. The state court decision here follows the same pattern of reciting some of the available mitigating evidence, but then demonstrating in its analysis that the evidence has not been weighted as a whole against the aggravating evidence.

The State's Petition fails to distinguish the error of the state court in Williams from the error here. When the California Supreme Court turned to assessing the potential mitigating evidence, it instead either ignored several mitigating factors or it failed to consider the aggregate effect of the mitigating factors. Furthermore, the state court's condemnation of trial counsel's closing argument was limited to illustrating trial counsel's ineffectiveness. 14 Cal. 4th at 353 (App. 142d-143d) ("[W]e will assume arguendo that Agajanian failed to afford constitutionally adequate representation because he allegedly . . . delivered an unfocussed closing argument, . . .) Nowhere does the state-court decision demonstrate an understanding that the argument was prejudicial as well as ineffective or that the prejudicial effect of the argument should have been aggregated with counsel's other failings (such as the failure to present certain mitigating evidence) in assessing prejudice. The state court decision was an unreasonable application of Strickland.

C. The State Court Failure to Find Prejudice Under the Facts of This Case Was Objectively Unreasonable.

A state court decision may also involve an unreasonable application of Strickland if, in light of the facts of the case, the decision is "objectively unreasonable." Williams, 529 U.S. at 409. The circuit court found that, given the record of this case, it was "objectively unreasonable" for the state court to to determine that the aggravating evidence was "overwhelming" and precluded relief. 288 F.3d at 1118-1119 (App. 67a-68a). The circuit court based its finding on the

reasonable probability that the jury "would have returned a life verdict had they had the opportunity to hear and consider the available mitigating evidence, had [Visciotti] not been inaccurately portrayed as the one 'bad seed' in [Visciotti's] family, and had [trial counsel] not advised in his closing argument against considering mitigating factors that could have outweighed the aggravating factors." 288 F.3d at 1118 (App. 67a-68a).

The State disputes the circuit court's finding that it was objectively unreasonable to deny relief under the facts of this case. Yet it does not challenge the weight or legitimacy of the available mitigating evidence, or argue that trial counsel's costly blunders in closing argument had any strategic basis. Rather, the State argues only that the circuit court should not have considered the length of the jury deliberations or the questions that the jury had regarding definitions of certain terms.

The argument misidentifies the bases of the circuit court's decision. The circuit court did not grant relief because of the length of the jury deliberations; it granted relief because to do otherwise, given the wealth of potential mitigating evidence and trial counsel's argument against his client, would have been objectively unreasonable. 288 F.3d at 1118-1119 (App. 67a-68a). The length of the juror deliberations and the questions regarding definitions of terms serve only to show that a verdict of death was not foreordained. The State has not shown any reason to question the circuit court's finding that, based on the record of this case, it was objectively unreasonable to deny relief.

VI.

CONCLUSION

For the foregoing reasons, Respondent John Louis Visciotti respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: August 28, 2002

WILLIAM H. FORMAN
STATIA PEAKHEART

Deputy Federal Public Defenders

No. 02-137

IN THE

SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, WARDEN, PETITIONER

vs.

JOHN LOUIS VISCIOTTI, RESPONDENT

AFFIDAVIT OF SERVICE BY MAIL

I, VIRGINIA E. CURRANO, declare that I am a citizen of the United States, am over the age of eighteen years,and am not a party to the action entitled above, my business address being 321 East Second Street, Los Angeles, California.

I have served the attached OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: To William K. Suter, Clerk, Supreme Court of the United States, an original and ten (10) copies: AND , by placing one copy in a separate envelope addressed for and to:

John Swan
Deputy Attorney General for the State of California
110 West "A" Street, Suite 1100
San Diego, CA 92186-5266

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at Los Angeles, California, on the 28th day of August, 2002. There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

This affidavit is executed at Los Angeles, California, on August 28, 2002. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Virginia E. Currano

ACKNOWLEDGMENT

State of California
County of Los Angeles
On August 28, 2002, before me, Patricia Jacobson, Notary Public, personally appeared Virginia E. Currano, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

NOTARY PUBLIC

PATRICIA D. JACOBSON
Commission # 1213224
Notary Public - California
Los Angeles County
My Comm. Expires Mar 15, 2003